

**LEGITIMATION IN TERMS OF QUESTIONING: INTEGRATING POLITICAL
RHETORIC AND SOCIOLOGY OF LAW¹**

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Workshop on Normative and Sociological Approaches to Legality
and Legitimacy, International Institute for the Sociology of
Law, Oñati, 24-25 April 2008

Contemporary social and political shifts have rendered political legitimacy more problematic. The weakening of national boundaries from above and calls for more democracy from below have brought into question the mechanisms by which states establish legitimate power. We have witnessed depoliticisation but also greater political participation, each phenomenon bringing political legitimacy into question in different ways. In such times of social destabilization rhetoric comes to the fore² as a way of expressing contingency and searching for new solutions to our problems. Rhetoric is all-pervasive in contemporary politics; in expensive election campaigns, in the legislature, and in the media where competing actors engage in a daily round of argumentation. However, rhetoric has at the very least been inadequately theorised in political studies, and at worst entirely ignored. Its existence is acknowledged, yet it is often viewed as something purely cosmetic or entirely negative, an obstruction to better politics. Even while rhetoric is accepted as necessary by political actors and routinely used to justify political power, theories of legitimacy hardly take account of

¹ For their comments and ideas, my thanks go to Michel Meyer and to the students in my postgraduate rhetoric class at The University of Manchester.

² Brooke-Rose, in Meyer, M, *Rhetoric, Language and Reason* (University Park, Pennsylvania State University Press, 1994), p. 35.

its existence. Many theorists attempt to rule out rhetoric on normative grounds as manipulative discourse, but this does not alter the empirical reality of its importance: as Michel Meyer comments, 'to condemn language for being manipulative is to condemn language for being'.³

This paper proposes some ways by which to integrate rhetoric with law in a theory of legitimacy. Why attempt to integrate the two? One could study rhetoric on its own, as is often the case for specialist rhetoricians. However, to examine rhetoric in isolation would be only a partial view, and one which would implicitly accept the historical denigration of rhetoric as style without substance, with the real story lying elsewhere in ideologies, institutions, and interests. Moreover, argumentation does not exist outside the legal and institutional framework which supports it. From the opposite perspective, the case for linking the two is that even when political decisions are grounded in constitutional power, it is usually deemed necessary to argue this, to claim the value of such provisions and the legitimacy of resorting to them. Therefore an *integrated* view is essential.

In developing this picture, I employ a new philosophical perspective—which incorporates rhetoric as a central element—departing from the problematisation of legitimacy to theorise legitimacy, rhetoric and law in terms of questioning. Michel Meyer's problematology is a systematic philosophy of questioning which provides a new way to conceive of reason, giving positive value to questioning and articulating an expanded conception of answering. Using it, we can theorise law as one form of resolving legitimation questions and rhetoric as another while situating both within a coherent philosophical framework which relates the two. This is a post-

³ Meyer, M, 'Rhetoric and the Theory of Argument' (1996) *Revue Internationale de Philosophie*, 50(2), pp. 325-357.

metaphysical view—in the traditional sense, although problematology is nevertheless a foundational conception of reason, grounded in a principle⁴—which supports a multidisciplinary view of political legitimation and which is adapted to the contingency of contemporary politics and society. Through Meyer's novel understanding of the question-answer link, he is able to account for the unfolding of social systems from within themselves without reference to external grounds.

This paper proceeds by first discussing the separation of rhetoric and law through the negative philosophical conceptions of rhetoric, and also briefly outlines Meyer's alternative philosophy and the improved place of rhetoric within it. Secondly, I describe legitimacy in terms of this new theory of questioning, applying Meyer's concept of the problematological difference to integrate rhetoric and law as complementary problematising and deproblematizing mechanisms, respectively. Finally, I bring the rhetorical concepts of *ethos*, *pathos*, and *logos* to bear upon the conception of the late modern state. Meyer's philosophy is not well known, but unfortunately my discussion of his logic must be necessarily brief in order to extend the analysis. For now, I note that Meyer's approach is always to integrate, to understand both the greatest philosophical questions of knowledge and the world alongside the smallest, most trivial aspects of meaning. The strength of his thought lies in his ability to move beyond epistemological obstructions to see the unity in human experience amidst its infinite variety.

⁴ Meyer, M, *Of Problematology: Philosophy, Science and Language*, Trans. D. Jamison with A. Hart (Chicago, University of Chicago Press, 1995).

1. The separation of rhetoric and law

It is necessary that political actors hold legitimate power by virtue of their electoral mandate or institutional position, but these are not sufficient to legitimise all their actions. In democracies, legitimate power is political in that it is conditional. The legal system provides a solid foundation, however it does not dictate political action in a mechanistic way. In practice, political actors are engaged in a constant effort of argumentation in support of their actions. And yet, little mention, if any at all, is made of rhetoric in political theory. Here, the source of state power is sought in a foundational principle underpinning law, such that the question of legitimacy could be permanently settled through a principle which establishes its necessity, allowing political activity to take place over and above it, with some degree of agency but within the parameters of this foundational solution. Argumentation is then residual to this legitimacy, becoming at best a rationalised procedural norm and at worst an obstruction to proper politics. With regard to the question of authority, many theorists reduce the power of the state to its ultimate, sole right to use force within a given territory. But again, this does not square well with our experience of politics. Poggi points out that contemporary Western states make little direct reference to their underlying recourse to force, and that everyday political experience has become highly 'civilianised'.⁵ Furthermore, the legitimate power of the state is limited by a concern for 'due process' which 'screen(s) the normal conduct of political business from naked force', to the extent that even though this 'yields procedural rather than substantive limits on political power...the former often presuppose and strengthen the

⁵ Poggi, G, *The State: Its Nature, Development and Prospects* (Cambridge, Polity Press, 1990), p. 73.

latter'.⁶ In taking a sociological view, which always highlights political practice, we understand that rhetoric and argumentation are part of this due process, alongside formal institutional and legal procedures. What is important in Poggi's point is that he suggests, firstly, that the legitimacy of state power might, at least in part, be grounded in discursive political procedures, including argumentation, and secondly that these procedures are intertwined with substantive powers. So, here emerges a dual conception of legitimacy, one in which we might reconsider the separation of process and foundation, of rhetoric and law, and instead search for a theory of legitimacy which sits better with our experience of everyday politics as involving both. While the legal system is autonomous in many respects, it is not separate from political argumentation but interacts with it, each adapting in relation to the other.

If we presuppose that the question of legitimacy is solvable—in the sense that it can be eliminated—then the essence of the state is what justifies coercion without any remaining contingency. This leaves little place for political argumentation, which is rendered 'rhetorical' in the pejorative sense. Certainly rhetoric can be but a stylistic gloss upon a decision already taken, but it can also be a genuine attempt at persuasion, even if this involves an appeal to the passions or the character of the speaker. And attempts at persuasion around a particular policy problem also imply an argument for the legitimacy of such claims. Politics is a highly contingent enterprise in which the legitimacy of authority is always contested at some level, even if the system as a whole achieves stability within this dynamism.⁷ To theorise the subtle process of adjustment to new political

⁶ Ibid, p. 16.

⁷ See Poggi (1990).

problems through policy processes and their relationship to the legitimation of the state, and to allow rhetoric to have at least some positive role and in acknowledging the reality of political persuasion, we require an epistemological framework which constructs rhetoric as a normal, legitimate element of discourse. But in so doing, we face significant philosophical limitations on the conceptualisation of rhetoric. Rhetoric has long suffered from Plato's condemnation of it as sophistry, and although Aristotle found a place for rhetoric he separated it from logic, the former dealing with the problematic and the latter with the necessary.⁸ Ever since, rhetoric has been viewed as a weakness of reason and/or as residual and trivial.⁹ The contingency of rhetoric has always been thought of as inferior to the necessity of logic.

Recently, there have been efforts to incorporate argumentation within social theory. For example, writers such as Habermas and Rawls brought in concerns for procedural norms, however their views have been criticised as overly rationalist and for reducing political questions to ethical ones.¹⁰ Elsewhere, Toulmin and Perelman¹¹ are well known for their efforts to revive argumentation, but both of them also attempted to restore its value by separating rational argumentation from manipulative rhetoric, in the process evacuating much of the reality of rhetoric while also maintaining it as a subsidiary method or technique by which to

⁸ Meyer, *Problematology*, pp. 67, 107; Meyer, M, *Rhetoric*.

⁹ Richards, IA, *The Philosophy of Rhetoric* (New York, Oxford University Press, 1965); Vickers, B, *In Defence of Rhetoric* (Oxford, Clarendon Press, 1988).

¹⁰ See, for example, Bourdieu, P, *Pascalian Meditations*, Trans. Richard Nice (Cambridge, Polity, 2000), p. 79.

¹¹ Toulmin, SE, *The Uses of Argument* (Cambridge, Cambridge University Press, 1964); Perelman, C and Olbrechts-Tyteca, L, *The New Rhetoric: A Treatise on Argumentation*, Trans. J. Wilkinson and P. Weaver (Notre Dame, University of Notre Dame Press, 1969).

establish norms which are then foundational.¹² To theorise political rhetoric in full we must account for its manipulative properties equally with the possibilities for its sincere use. However, restoring a place for rhetoric within existing metaphysical frameworks has proved difficult.¹³ The fundamental separation of contingency and necessity means that rhetoric will always be residual, a construction we see contained in the view that legitimacy must rest upon necessary foundations, and that a contingent legitimacy is weak and unstable. However, today political systems express a degree of contingency which cannot be ignored—as the discourse of contingency *par excellence*, rhetoric forms an essential element of contemporary political life.

So, an integrated view of rhetoric and law requires an integrated view of rhetoric and reason. We can find such a view in the philosophy of Michel Meyer—problematology, or the ‘philosophy of questioning’. Problematology is a new metaphysics, radically different from traditional metaphysics which presumes the possibility of a foundational proposition upon which all subsequent reason hinges; for example, the unified subject, which is insufficient for understanding contemporary society in which identity has been rendered problematic. Meyer argues that questioning is the foundational principle of reason, for when we ask the question of what is primary in reason, no matter what question we ask, questioning

¹² Meyer, ‘Rhetoric and the Theory of Argument’, p. 354.

¹³ Book I of Aristotle’s *Rhetoric* attests to this, laced as it is with contradictions and confusions about the possibility of manipulation. Another potential alternative is poststructuralist theories which argue that reason itself has been rhetoricised so that discourse is a free play of signifiers. However, this is also a partial and insufficient view of rhetoric: it is the converse of the above, a rhetoric without argumentation, since it cannot say how argument would function in a theory of language which is unable to establish reference; Meyer, *Problematology*, p. 128.

is necessarily first.¹⁴ That is, if we question questioning, we find that questioning becomes our first answer. This is reflexively secured in that the answer confirms the practice by which we reach it, affirming the question rather than dissolving it in the answer. This reasoning is not circular because the answer which confirms the primacy of questioning is different from the question with which we began. Here, Meyer offers the term 'problematological answer' to describe this response which answers to the initial question without eliminating it. It explicates the implicit and thus moves knowledge forward but at the same time it also expresses a question. This provides a different conceptualisation of resolution which has a dual characteristic in both resolving and maintaining the original question. He labels this the *problematological difference*. Questioning describes the possibility of an alternative, containing the possibility of answering within itself. Here, answering is necessary but no particular answer is necessary, in the traditional sense by which we think of necessity, for example in cause and effect logic. One cannot help but answer, but any answer must refer to an initial question in order to make sense so that, at any time, we can 'problematise' an answer and affirm the fundamentality of questioning. Meyer opposes the foundation of questioning to 'propositional' reason which presupposes a necessary link between question and answer such that real knowledge only resides in the elimination of the problematic. Problematology is thus an alternative conception of rationality which establishes the necessity of questioning while also affirming the inevitable contingency it generates.

In the *problematological difference*, answering has two dimensions: 1) the apocritical, that aspect of a response

¹⁴ Meyer, M, *Problematology*.

which dissolves a question, and 2) the problematological, that aspect which expresses a question. This difference is foundational and reflected secondarily within explicit discourse itself, such that every answer contains both qualities, although they can be expressed in different ways. A problematological response constructs a question or leaves an existing question open, whereas an apocritical response can become the basis of a new question via the problematological effect. This generates the possibility of dialectical links between questions and answers.¹⁵ Each new response becomes the subject of a new interrogation, with answers and questions building up reference points to create the context. In sum, Meyer describes answering as the *repression* of the problematic which establishes the autonomy of the answer. Repressions can be strong, in the case of the apocritical which eliminates the problematic in the answer, or weak, in the case of the problematological which maintains it. Because they stem from the singular problematological difference, these are themselves related. Meyer extends this analysis to the study of history, arguing that these repressions are complementary and inverse—when one is stronger the other is weaker, so that history proceeds in broad patterns of problematisation and deproblematisation (see Meyer 2000).¹⁶

Meyer also conceives of rhetoric in terms of questioning, providing a general definition of rhetoric as the negotiation of distance between subjects in regard to a question.¹⁷ While this applies to explicit rhetoric, it also allows us to theorise non-discursive phenomena in rhetorical terms because 'the rhetorical' is one property of the more fundamental

¹⁵ In the case of conversation between interlocutors, this is also dialogical.

¹⁶ See Meyer, M, *Questionnement et historicité* (Paris: Presses Universitaires de France, 2000).

¹⁷ Meyer, 'Rhetoric and the Theory of Argument'.

relationship between question and answer.¹⁸ Hence, we can consider rhetoric as a logic of identification and differentiation constructed either through explicit language or institutions and law or implicit social forces.¹⁹ By grounding rhetoric in questioning, Meyer does not condemn rhetoric as purely manipulative or residual, but he does allow for it to be so, shifting the question of its status to a question of its use. 'Black' rhetoric is that which treats a question as open when in fact it has already been decided, and 'white' rhetoric is discourse upon a problem in which the question is left open so that interlocutors can contribute towards finding a solution. For now, problematology allows us to situate both strong and weak responses to problems within a singular philosophy. Now, I will build upon this conceptualisation in articulating rhetoric and law in terms of these dual repressions.

2. Integrating rhetoric and law as repressions of the problematic

Liberal democracies are not in crisis but their legitimacy has been 'problematized', put into question by challenges to the welfare state, the devolution of power within states, the increasing power of supra-national institutions, an increase in the number of laws which threatens the coherence and manageability of the whole, and social change which has seen the waning of traditional non-state forms of social integration. A philosophy of problematisation will help us theorise this empirical problematisation. Since problematology

¹⁸ Meyer, *Problematology*; he proposes a three-part structure to the question-answer link—dialectical, hermeneutical, and rhetorical.

¹⁹ See Turnbull, N, 'Contingency and Problematology in the Social Sciences', (2007) *Revue Internationale de Philosophie* 242, pp. 451-72.

is based on questioning, it allows us to sidestep the propositional view of legitimacy and articulate it in terms of contingency. By broadening our conceptualisation of answering using Meyer's dual apocritico-problematological definition we can differentiate between different forms of solutions and thereby begin to articulate the complexity of contemporary political legitimation.

Conceiving of the state-society difference in problematological terms, the state is that which responds to public problems. The state is apocritical in that it is an answer, but it is also problematological in that the state itself is not the solution to public problems, but rather the mechanism by which answers are sought. Because it is an answer it is autonomous, its apocriticality separating it from civil society and giving it the general authority to deal with its problems, in relation to which the state must seek a new answer each time. Were we to conceive of authority in propositional terms, its authority is 'authoritarian' because it is unquestionable. In the problematological conception, the state has authority but is simultaneously in question. Hence we can distinguish between aspects of the state's authority which cannot be questioned, and those aspects which can be. The problematological character of the state generates the question of legitimacy. Authority enables the state to answer while democracy enables us to question it. And the question of legitimacy is the key characteristic of democracies which temper the authority of the state to impose its own answers to public problems. Authority and legitimacy are distinct questions but are also problematologically linked, the latter being the problematological effect resulting from the apocritical characteristic of the former. The legitimacy of the state is a question for the people, whose answer to it (consent) is either explicitly given or tacitly implied.

The state frames problems and searches for solutions, sometimes enshrining these solutions in law, at other times allocating funding and other resources via the executive and bureaucracy, and in other cases answering by rejecting the problem as a matter for the state. The question of legitimacy is variegated through various legal and institutional mechanisms, the most important of which is the popular plebiscite, in which the legitimacy of the state is most explicitly in question as a question of government. However, in democracies, we might say that legitimacy is always implicitly in question and repeatedly resolved through each new resolution of a public problem since the action (or non-action) of the state implies an answer to the related question of the legitimacy of its authority. This logic of implication is rhetorical, confirming the legitimacy of state power in its practical exercise which in turn figuratively symbolises its authority. Returning again to the difference between state and society, this difference can be expressed in problematological terms as a dialectic of question and answer, in which the identity of each and the distance between them is continually negotiated on a practical basis through the treatment of public problems. The negotiation of this distance—in line with Meyer's definition—is rhetorical.

Situating both rhetoric and law within the theory of questioning, we can articulate the difference between the two in terms of how they respond to—answer—public problems. Law is a strong, apocritical repression of the problematic while rhetoric is a weak, problematological repression: rhetoric and law are complementary. Law is a strong way of providing solutions to problems, fixing reference points which structure social action along with reflexive determinations which limit the extent of state powers. Law guarantees rights for individuals and collective groups, protecting citizens from arbitrary treatment by a strong repression which limits

problems and makes it easier to decide what is in question and what is not in public affairs. In so doing, law instantiates and reinforces norms. But social complexity means that law cannot account for every situation (indeed, in many cases good laws are not overly prescriptive since these stifle their ability to adapt to new contexts). New problems for which we have no ready-made solutions need to be expressed and answers sought through more contingent means—this is the domain of rhetoric. New problems are rhetorically debated in the public sphere, including through the media and in the legislature. Whereas law limits the passions, this discourse admits them because it concerns values and the differences between us, who is deserving of praise and who of blame. Multiple solutions are not ruled out but developed and deliberated upon. Even in cases for which existing law applies, we sometimes require rhetoric to deliberate upon which interpretation and application of that law is to decide the question. And when the law fails to cope with a situation, we use rhetoric to argue for changes to the law to reflect new circumstances, new opinions, and new claims to recognition. The constitution sets limits on the state but rhetoric is the discourse of variability which the law cannot entirely eliminate.

The legitimacy of the state is put in question and it can respond through the dual mechanisms of answering. Rhetoric and law correspond to these forms of answering as two forms of repression stemming from the bifurcation made possible by the problematological difference. Both repressions, taken as a whole, generate legitimacy. Law provides stable, autonomous reference points which guide social action and reduce problematicity. The strong repression of law establishes legitimacy so well that, in practice, legality itself becomes an argument for the legitimate exercise of authority. Law generates legitimacy because it *deproblematizes*. In contrast, rhetoric responds to problematicity by expressing it. The

indeterminacy of rhetoric functions as a legitimating device insofar as it explicates what is problematic, expressing public sentiment in maintaining the openness of a question, which is also a necessary step in enabling the public to deliberate upon its problems. Rhetoric generates legitimacy because it *problematizes*. The public will is formed in the public sphere in all its complexity and passions, where the participants are given recognition through the position they take in regard to political questions. This brings the audience into the deliberative process and is more important than a residual conception of 'due process'. Aristotle noted well that rhetoric is most likely to persuade an audience when it involves them in the argument than when the argument is presented as a *fait accompli*.²⁰ Argumentation in the public sphere which involves a wide variety of participants is thus persuasive for the question of legitimacy. Rhetoricalness does not establish legitimacy in the same way as legality; simply reciting an argument is insufficient to reach a solution because rhetoric is by nature a weak repression. However, it does generate legitimacy insofar as its practice is inclusive and persuasive to the audience. Here, rhetoric can certainly be manipulative, pretending to leave questions open for the public when in fact the decision has already been taken by the elites occupying the state. This possibility results from the state holding authority, and while that authority can be questioned, to do so requires extensive political mobilisation. But even if questions are not widely debated, the solutions can still be considered legitimate as long as there is no effective opposition, since established authority wins the argument by default. Here we find the importance of a strong political culture and public sphere which effectively

²⁰ Aristotle, *Rhetoric*: hence, rhetoric uses the enthymeme rather than the syllogism.

questions state decisions and brings to bear sufficient pressure on its legitimacy so as to persuade it to act in accordance with democratic will formation.

Since rhetoric and law are related to each other through the problematological difference, we need not epistemologically separate them as standing for contingency and necessity, respectively. Instead, we can relate one to the other, such that resort to argumentation presupposes and reinforces the legitimacy of the force of law, and vice versa that law limits and structures what is to be allowed in argumentation, including the rhetorical style that discourse should take in particular institutional locations. In modern states, the dialectical link between political rhetoric and law is typically 'rationalised', such that arguments—or at least their outcomes—are presumed to be rational. Policymaking ideally follows a linear order of question and answer commencing in the public sphere, through deliberation in the legislature to executive decision, and then to implementation and monitoring by the bureaucracy. The bureaucracy maintains highly rationalised operations, hence its concern for statistical monitoring and quantitative performance targets (*logos*), rather than discourse on values (*pathos*). The state converts the public will into formal, non-rhetorical executive decisions and law. However, this linear path is itself a rhetorical construction—policymaking is a much more disorganised, reflexive, and political process in practice than the rational model supposes.²¹ However, the legitimacy of the modern state rests greatly upon its 'rationality', so

²¹ See, for example, Colebatch, HK, *Policy*, 2nd edn (Buckingham: Open University Press, 2002); Fischer, F, *Reframing Public Policy: Discursive Politics and Deliberative Practices* (Oxford: Oxford University Press, 2003); and Majone, G, *Evidence, Argument, and Persuasion in the Policy Process* (New Haven: Yale University Press, 1989).

constructing this rhetorical rationality remains an important task for governments even in the face of confusion, incompetence, and mistakes.

3. The rhetorical modern state

Conceiving of the state as a problematological entity, we can bring rhetorical concepts to bear upon it. The Aristotelian triptych of *ethos*, *pathos* and *logos* provides a complete account of the modes of persuasion, importantly including concern for character and the passions alongside logical argumentation. Using these rhetorical concepts, we can begin to develop a perspective upon the modern state which articulates elements other than rationalisation in its development and to extend the view of state and society as rhetorically related.

Poggi defines the institutionalisation of political power (including the state) as consisting of three aspects; depersonalisation, formalisation, and integration.²² However, despite significant depersonalisation and formalisation in the modern state, human societies require other rhetorical characteristics to achieve integration and for the first two elements to be accepted as legitimate. While legal-rational authority is central to the modern state, other rhetorical elements are also present in different ways. When the state grounds its decisions, it does so through *ethos* which belongs to the leadership and the legislature. The response is formalised in *logos* by executive order and the administration of the orders by the bureaucracy. Although *pathos* is absent from these aspects of the state, it is strongly present in civil society, which interprets the actions of the state in terms of what it deems responsible. The judiciary then deals

²² Poggi, *The State*, p. 18; drawing on Popitz.

with that *pathos*, problematising actions and providing answers which uphold norms, reflecting upon them and re-formalising them in *logos* through the decisions of the court and maintenance of the law. Taken together, the three elements form a rhetorical whole, each separate from but also complementing the others in an ideally integrated form.²³

In the ideal of rational planning, government is administered by a depersonalised bureaucracy which acts according to general rules which guarantee universality and logical consistency, guarding against bias and corrupt actions in favour of particular interests. The administration of the state is characterised by *logos*, to the exclusion of *ethos* and *pathos*. Administration still involves argumentation, however this must be persuasive on rational grounds, involving claims based in law, established procedures, and scientific assessments of the evidence. Similarly, the courts are impersonal, judging compliance with the law according to logical rules of evidence and procedure, even when this concerns judgements upon the character of the accused. But people do not accept an entirely impersonal and rationalistic state, so there must be some compensatory personalisation in order to secure the people's acceptance of state rule. So, *ethos* belongs to the leadership and the legislature, and in particular to the leaders of the government and opposition. Whereas the *ethos* of the bureaucrat is suppressed in favour of *logos*, *ethos* is allowed and necessary for the politician, who must be one of, and stand for (metonymy), the people.²⁴ This promotes the legitimacy of the state in that a person, rather than a functionary, directs the administrative apparatus. It

²³ Within each location the practice of argumentation involves all three elements.

²⁴ Rhetoric involves both the figurative and argumentative dimensions; see Meyer, M, *Meaning and Reading: A Philosophical Essay on Language and Literature* (Amsterdam: John Benjamins, 1983).

presents a vision of the state as controlled by the people, a rhetorical representation of a state which grounds legitimate rule *in* the people. Even though the executive and the legislature produce formal laws and decisions, they are distinguished from the bureaucracy by a form of identity as well as in terms of their formal powers to act.

People interpret the world more easily through narratives and characters than through legal-rational discourse, so they follow political action and debate the legitimacy of the government through the *ethos* of the players. This is why commentators even attribute 'character' to a government and seek an identity in it which matches popular perceptions of national culture and the spirit of the times. The character of the government in turn legitimises certain aspects of the culture—it matters that leaders can be of working class background, and that there have been no female or black US Presidents, and that the professional middle classes dominate political positions. Arguments against government policy are formed by the official opposition linking policy argument to the *ethos* of the leaders of the government. For example, failing to stop a run on the Northern Rock bank becomes an argument against the UK Prime Minister's personal competence. The division between government and opposition is a choice between individual leaders as much as between ideologies, a choice which has become even more important with the waning of established political cleavages. Framing the question of the legitimacy of the government through the *ethos* is a more meaningful question for us because it is a question of identity, about which we can feel passionate and take sides, giving the impression that the state is not a monolithic power but requires our active support for its legitimacy.

This personalisation applies to all the ministers of the executive. The minister is responsible for all matters within

his portfolio and for the actions of his department, and personally responsible for its success and failure in regard to public problems. Hence ministers in charge of key portfolios become public personalities. The leader of the government is allowed and expected to show the strongest personality, so as to be distinguished from other members of the executive over whom she exercises effective and symbolic authority. Mechanisms of appointment are different for the executive than for the bureaucracy, being made in part with regard to personal character alongside performance. The leader judges performance and rewards or demotes the minister accordingly. For the public, it is important that the Minister is held personally responsible, such that when there is a breach of procedure or a failure to deal with a problem the minister is *blamed*, by the opposition in parliament, by the media, and by the public. If this rhetorical pressure is strong enough the leader might replace him to save the legitimacy of the whole. The appointment of Ministers to certain departments is also interpreted according to their *ethos*. For example, a leader might appoint a hard character, known for cutting expenses, to a department seen to be profligate. Or when the government wishes to appear softer or firmer in particular policy areas, it changes the minister or spokesperson on the issue, often through gendered appointments.

Pathos is the remaining element of the rhetorical triptych. Since the administration of decisions is characterised by *logos*, *pathos* is left to civil society. Even though the state is run on legal-rational principles, it accepts that the passions have a place, so it leaves them to civil society where *pathos* forms the logic of identity and difference between people. The people are the audience for the state, interpreting policy according to what it deems responsible and just. The modern state is faced with the

problems of integrating a large territory of diverse peoples and all their structural divisions, such as gender, race and class. These divisions are marked by the passions, in that we feel compassionate or impassionate or resentful or envious or welcoming towards others. When it comes to particular problems, the public *pathos* towards others is directed towards the state itself, for example negatively in anger at the state for not acting in response to the fear of outsiders generated by immigration, or positively in the spirit of reconciliation with native peoples. Modern states seek legitimacy by promoting a passionate nationalism which acts to integrate an otherwise divided people in a common identity, grounded in the state itself. In liberal capitalist democracies, the dominant *pathos* is the desire for economic advancement, including the pleasures of consumption. The performance of governments is monitored regularly through statistical measures (*logos*) and measures of consumer confidence in that performance (*pathos*). Reflecting the importance of the economy, the leaders of the government must project the *ethos* of the competent manager, so they adopt business dress.²⁵ At the same time, economic ideology rules out alternative visions of the good life as illegitimate. And even if we would no longer consider culture in structural terms, we can say that consumer culture generates hegemonic legitimacy through a rhetorical effect of seduction. But within this passion for growth is also the question of the distribution of wealth, around which continue to lie many of the most passionate social divisions and which structure the dimensions of the legitimation question for the state, since inequalities generate differences among the public expressed as aspiration, resentment, and envy. In general, *pathos* concerns our relationship with the other; it

²⁵ In authoritarian states, the legitimacy of the ruler is at the discretion of the army and police force, so he dresses in uniform.

is that which brings us together or separates us.²⁶ If we accept that *pathos* cannot be eliminated in an entirely rationalist political discourse, we admit the passions but we are also made aware of their dangers. The modern state cannot rule out *pathos*, but instead denies it power and legitimacy by relegating it to one sphere, which unfortunately creates the impression of public irrationality among the officials of the state—who also reject political appeals to the passions as populism—and inversely giving the impression among the public of an impersonal and inhuman state. Legal-rational values threaten civil society when they encroach on its territory and also when they fail to recognise the legitimacy of public problems framed through the passions. Bureaucracies become dangerous not when *pathos* is eliminated, but when *pathos* merges with *logos* and becomes a passion for rules which turns against humanism.

In the public sphere, the three rhetorical dimensions meet and the difference between state and society is questioned. Here, the passions of the people are expressed in debates about the best policy solutions, the competence of the government and the character of the leaders, all driven by what it means for the legitimacy of the rulers who exercise a dominant power over the whole through their institutional authority to answer. Law forms the backdrop to these debates, and putting the law into question requires considerable political will. While the state concedes the necessity to include the public and to persuade it rather than force it, the effort of argumentation is often top-down, informed by the differential access to expertise held by state officials and divisions among the public at large. Values are questioned and affirmed in political discourse, values which are themselves

²⁶ See Meyer, 'Rhetoric and the Theory of Argument'.

expressions of *pathos* as much as they are logical principles governing action. The state must respond to the passions of the population, and its legitimacy depends in part on how well it articulates but also controls them, suppressing some sentiments while promoting others. The media is the primary vehicle through which public debate is channelled and questions of legitimacy are formed, so its ownership, structure and tone are all-important in rhetorical debate. This rhetoric is not only deliberative. It also includes *epideictic* rhetoric which is used at formal state occasions and at key moments to praise the nation and blame its enemies, and to reaffirm or reframe values.

4. Legitimation problems in the modern state

So, the emphasis of legal-rational authority in the modern state can be understood fully not as the rejection of emotions and identity but as a rhetorical separation in relation to elements of reason and authority. It is the separation of these aspects which characterises the authority of the modern state and how it pursues its task of legitimation under contingent circumstances. In practice, of course, the picture is more complicated. While supposing a rhetorical whole, this separation produces its own legitimation problems, for example with the impersonality of the state alienating the people, and the dangers of governments seeking office through the personality of the leader detached from assessments of effective policy. In practice, the public do not accept state dominance of policymaking and demand greater influence over deliberation in between elections. The distance between state and society is continuously negotiated with regard to particular policy problems and the broader question of legitimacy through which people express their expectations of the state.

In the early modern state, we find an emphasis on the strong repression of law, with government run by an elite which conducted argumentation amongst itself. Pressures from civil society led to increasing democratisation, and the state conceded more rights as it renegotiated challenges to its legitimacy. The increasing scope of the state led to increasing public expectations for it to deal with increasingly complex problems. The 'legitimation problems' of the 1970s found the values of the welfare state and public expectations in conflict with demands for economic liberalisation, so neoliberal institutional reform acted to limit the responsibilities of the state, some of which were shifted back to civil society, and to the economy in particular. State actions to restrict fiscal latitude and limit its debt were accompanied by an ideological repositioning in favour of market mechanisms and limits on state expansion (if not necessarily withdrawal), seen in rhetorical criticisms of the 'nanny state' and the language of individual responsibility. Although neoliberalism's strongest proponents were less successful than they hoped,²⁷ the ideology of this state-society reconfiguration remains a powerful rhetoric, even in countries where reform has been far more moderate. Lately, 'globalisation' has been used as an argument for necessitating policy change as much as it is a description of empirical economic and social change. In the most neoliberal welfare states, policy instruments effect an identity politics which sustains majority support, for example 'work to welfare' schemes which confirm the social distance between deserving and undeserving classes of welfare recipients. An *epideictic* discourse of character denigration responds to the downward envy of the workers and affirms their

²⁷ See Pierson, P, *Dismantling the Welfare State? Reagan, Thatcher, and the Politics of Retrenchment* (Oxford: Oxford University Press, 1994); Poggi, *The State*, p. 126.

good character at the same time. The tabloid media sustains these characterisations and government policy formation becomes locked into them. New policy measures therefore enshrine the different identities not so much by reducing income transfers (which is politically difficult) as through control mechanisms, whereby the poor are penalised by being subject to interventionist state controls in contrast to other, more autonomous citizens. So, when a reconfiguration of the redistributive system is off the table because of the need to limit state financial liabilities, its legitimacy is affirmed through symbolic rhetoric and complementary mechanisms of differentiation in formal policy mechanisms. In all this we see the intersection of the politics of identity (*ethos*), envy and resentment (*pathos*), policy and political strategy (*logos*). When the various parties are seen to be offering similar policies, the rhetorical logic of identity and difference becomes all the more important in sustaining the legitimacy of inequality.

In light of these legitimation problems, and restricted state resources, previous responses to legitimation challenges which involved extending citizens' rights could not be sustained. So, the resolutory effect of strong legal repression weakened and rhetorical repression became increasingly important. States took a greater interest in propaganda and public opinion measurement and management. The advent of new mass media technologies brought the rhetoric of images to the forefront of politics, so that today media strategy is as important as policymaking itself, and sometimes more so, in a permanent political campaign for public office.²⁸ As the opportunities for reform are more circumscribed, the contest for legitimacy becomes a media narrative dominated by

²⁸ See, for example, Seldon, A (ed), *Blair's Britain: 1997-2007* (Cambridge: Cambridge University Press, 2007).

the characters of the leaders. In these circumstances, political argumentation can become dangerously *ad hominem*, for example, in the United States, where significant public resources were deployed by Ken Starr in attacking President Clinton's character, or in France with the distractions of the social life of President Sarkozy. This is an example of rhetorical differentiation rather than charismatic authority, in the sense of *ethos* bearing the weight of legitimation on its own, as it might have done in some pre-modern societies. Nonetheless, when the focus on *ethos* is too great it can detract from the ability of the public sphere to support informed debate upon social problems.

When legitimacy weakens, we see an increasing significance of rhetorical legitimation. Political authority is questioned more and more, and *pathos* becomes more important in terms of the subjective and emotional response of the public, which decides what is responsible and what is not. The state thus becomes increasingly concerned not only with the technical and/or judicial correctness of policy and law, but also with the appearance of decisions and their reception by the audience (the media, experts, interest groups, and the general public). Rhetorical functions have been institutionalised in the bureaucracy, which has seen a growth in the number of media positions and in their ranking to the point of taking seniority over and above many civil servants directly involved in policy development. Media officers are now often involved in designing policy itself. Political parties also make strenuous efforts to manage the apparent *ethos* of the leader and the government in general, mounting a daily rhetorical programme of interpretation for the purpose of legitimation. Social science evidence has now been 'rhetoricised' to some degree, increasingly being used as the

basis of argumentation rather than decision.²⁹ In contrast to the view which sees the rationalisation of policymaking conceding more power to the bureaucracy (for example, Poggi 1990), rhetorical concerns have led the leadership to look elsewhere for support in its legitimation task. So, along with the appointment of media professionals we see a greater use of private sector sources, such as consultants and think tanks which provide policy knowledge tailored for government legitimation strategies. The new-found rhetorical sophistication of the state challenges the media's claim to be the arbiters of public opinion, to which the media has responded by declaring governments to be obsessed with 'spin'. While often successful, a danger is that the message of the government is lost as all its communications are regarded as less trustworthy, a form of black rhetoric prompting some members of the public to switch off and become depoliticised, itself raising the danger of an alternative political figure mobilising a counter-politicising populism. When rhetorical repression becomes weak, legitimation can become excessively problematised, and a stronger institutional reconfiguration may be necessary in order to resolve it. Such a shift might take form in the entry of new parties or through new institutional mechanisms which extend public rights to be involved in decision making, for example in recent experiments with participatory democracy.

²⁹ See Majone, G, *Evidence*; Fischer, F and Forester, J (eds), *The Argumentative Turn in Policy Analysis and Planning* (Durham: Duke University Press, 1993); and Gottweis, H, 'Rhetoric in Policy Making: Between Logos, Ethos, and Pathos', in Fischer, F, Miller, GJ, and Sidney, MS, *Handbook of Public Policy Analysis: Theory, Politics, and Methods* (Boca Raton: CRC Press, 2007) pp. 237-250.

5. Conclusion

In considering legitimacy in terms of questioning, we do not require a foundational proposition which declares what legitimacy, unproblematically, 'is', but instead an understanding of how states respond to the question of legitimation in contingent circumstances. Certainly, political systems reflect upon their own operations and articulate norms which underpin law. However, these are themselves answers which can be questioned through the contingent mechanisms of political deliberation. Developing an integrated theory of rhetoric and law supports the consideration of day to day politics alongside legal principles. Rhetoric is thoroughly political since it deals with the contingency which characterises political relations between us. Law is stronger, and encapsulates our rights with regard to each other, rights which remain out of the question and which therefore provide structure to public life. But we should not separate the two through the easy denigration of rhetoric as residual in contrast with what we presume to be the necessity of law. By considering both in terms of questioning we have a way to locate them within a singular epistemological framework and to understand their variation through history and across regime types. And, in doing so, we need not construct them as dependent upon some foundational metaphysical proposition or norm, but rather understand how such norms arise as the apocritical residue of social action, contingent phenomena which take on the appearance of necessity via their autonomisation from the historical questions to which they responded. Problematology supports an integrated view of rhetoric, institutions, and law through the framework of questioning. Modern states can be characterised in terms of how they respond to public problems while at the same time responding to the question of their legitimacy to do so.

In putting forward this non-traditional metaphysics, we need not oppose the passions against the rationality of good governance in the modern state, but rather understand their separation in modernity and the further questions this raises. In problematology, the foundational place of the problematic secures a systematic view, even if it acknowledges a place for the contingency expressed in rhetoric. By situating the rhetorical within a foundational philosophy, we understand the human as the problematic itself, for we are always in question, and thus we have a guiding principle for the operation of democracy in acknowledging our shared contingency. But this does not deny the necessity to produce answers in order to guarantee the rights of each in relation to the other and the necessity to answer in order to repress unregulated questioning which would lead to social disorder. To restate the point above, were we to consider the answer to the question of legitimacy as only that which abolishes the problematic, the authority of the state would be reduced to the 'authoritarian' by default.³⁰ By broadening our view of answering, and by seeing the answers of the state as a linked series of partial answers, we moderate our view of the state and broaden our understanding of its legitimacy. The state has the legitimate authority to provide answers to questions and thereby establish consistency, but this does not eliminate all problematicity. Even in authoritarian regimes there is a legitimation question to answer, except that the public is not allowed to question the authority of state decisions, so legitimacy is diverted almost entirely through the *ethos* of the leader of whom public praise is demanded in the form of frequent and colossal *epideictic* displays.

³⁰ See Sciulli's criticisms of Tilly in this respect; Sciulli, D. 1992. *Theory of Societal Constitutionalism: Foundations of a Non-Marxist Critical Theory* (Cambridge: Cambridge University Press, 1993), p. 3.

This paper provides only an initial sketch of the problematological view of the state. But we can say that, in this view, legitimation occurs simultaneously through formal mechanisms and related rhetorical means. Establishing legitimacy is a dynamic process of question and answer which deals with the demands of problematising and deproblematising in securing political authority and integrating society despite our differences. Beyond further theoretical elaboration, a future empirical task is to describe the relationship between legal-institutional forms and particular rhetorical practices.